No. 14114

United States Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM EDWARD FRANKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Northern District of California, Southern Division.

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Appeal from the United States District Court for the Northern District of California, Southern Division.

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Northern District of California, Southern Division. The appellant was sentenced to the custody of the Attorney General for a period of eighteen months. [5-6][1] The district

[1] **Numbers appearing in brackets herein refer to pages of the printed Transcript of Record filed herein.**

court made no findings of fact or conclusions of law. No reasons were stated by the district judge orally for the judgment rendered. Title 18, Section 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. The indictment charged an offense against the laws of the United States. Appellant was charged with refusal to submit to induction contrary to the provisions of the Universal Military Training and Service Act. [3-4]

This Court has jurisdiction of this appeal under Rule 27(a) (1), (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [7]

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act. [3-4] It was alleged that appellant registered with Local Board 19, Napa County, California. It is alleged further that he was finally classified in Class I-A, making him liable for military training and service. It is then alleged that he was ordered to report for induction. [3-4] The indictment then concludes that appellant did "knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States as provided in the said Act, and the rules and regulations made pursuant thereto." [4]

Appellant was arraigned and pleaded not guilty. He waived the right of trial by jury. [9] The case was called for trial on May 22, 1953. [8] Evidence was heard and arguments were made on the motion for judgment of acquittal. [10-50] The motion for judgment of acquittal was denied. [36, 50] The court found appellant guilty as charged in the indictment. [5-6] Appellant was sentenced to the custody of the Attorney General for a period of eighteen months. [5-6] Bail was granted pending appeal to this Court. Notice of appeal was timely filed and the transcript of record, in-

cluding statement of points relied on, has been duly filed. [52-53]

THE FACTS

Appellant was born on April 26, 1932. [F. 1][2] He registered with his local board on April 27, 1950. [F. 2, 3] The local board mailed to him a classification questionnaire on April 30, 1951. [F. 4, 11]

Franks filed his questionnaire with his local board on May 10, 1951. [F. 4] He showed his name and address and stated that he had no previous military service. [F. 5, 6] He answered that he was a student preparing for the ministry under the direction of the Watchtower Bible and Tract Society, the legal governing body of Jehovah's Witnesses. [F. 6] He showed that he was single and employed as a general laborer for Millage & Walker in Napa, California. He showed that he had been working at this job since February, 1951. [F. 7] He stated that the other business that he pursued was preaching. [F. 8]

The appellant showed that he had attended six years of elementary school and three years of junior high school. He stated that he did not attend high school but quit school when he completed junior high school. [F. 9] He showed the board that he was then pursuing the Course in Theocratic Ministry at a school conducted by Jehovah's Witnesses. [F. 9]

Franks signed the conscientious objector blank appearing on page 7 of the classification questionnaire. This is Series XIV of the questionnaire. [F. 10] He claimed classification as a conscientious objector. He asked the board to place him in Class IV-E. [F. 10]

Accompanying his questionnaire was a letter in which

[2] **Numbers preceded by "F." appearing herein within brackets refer to pages of appellant's draft board file, Government's Exhibit 1, a file of photostatic copies of papers filed in the cover sheet of Franks. At the bottom of each page thereof appears an encircled handwritten number that identifies the page in the draft board file.**

he explained to the board that he was a conscientious objector. In this letter he requested that the board supply him with the special form for conscientious objector that he had signed for in Series XIV on page 7 of the questionnaire. [F. 12] The local board gave to Franks the conscientious objector form on May 10, 1951. [F. 13]

Franks filed the conscientious objector form on the same day that it was given to him by the local board. [F. 13] He signed Series I (B). In this he certified that he was opposed to participation in both combatant and noncombatant military service. [F. 13]

Franks answered that he believed in the Supreme Being. He then described the nature of his beliefs in religion forming the basis for his conscientious objections to war. [F. 13] He showed that he believed in Jehovah, the Almighty God. He answered that he gave all of his allegiance to the Kingdom of Almighty God. In his conscientious objector form he showed that he was an ambassador for the Lord Jesus Christ and, as such, preaching the gospel of God's kingdom as the only hope for mankind. He showed that he maintained a position of strict neutrality with respect to the wars of this world and would have absolutely nothing to do with them as a soldier. [F. 15-16] He showed that he had been reared as one of Jehovah's Witnesses by his parents. He informed the board that he had been studying the Bible and had been trained as a conscientious objector since the age of seven. [F. 14]

He named the Watchtower Bible and Tract Society and its president, Nathan H. Knorr, as the persons upon whom he relied for religious guidance. [F. 14]

Franks showed that he believed in the use of force only in self-defense. [F. 14] He showed that he regularly attended meetings and that such, together with his preaching activity, proved the depths of his convictions and the consistency of his belief. [F. 14] He said that he had given public expression to his conscientious objections. [F. 14]

The schools that Franks attended were listed. He then

showed his employers and his places of residence. [F. 14, 15]

Franks showed that his parents were Jehovah's Witnesses. He then proved that he was a member of a religious organization known as Jehovah's Witnesses of which the Watchtower Bible and Tract Society is the legal governing body. He showed that he had been one of Jehovah's Witnesses since 1940. He named his church and the presiding minister thereof. [F. 17]

Franks showed that there was no official statement of Jehovah's Witnesses toward participation in war as far as others were concerned. He showed that Jehovah's Witnesses depended upon each one to read the Bible and Watchtower publications and take an individual stand upon learning the commandments of Almighty God. [F. 17] He then listed certain persons as references and signed the form. He referred to the booklet *Neutrality,* published by the Watchtower Bible and Tract Society, as a statement of his conscientious objections to participation in war in any form. [F. 19]

The local board on June 12, 1951, classified Franks as liable for unlimited military training and service. It rejected his claim for classification as a conscientious objector. [F. 11] Following notification of this classification Franks requested a personal appearance. This was granted. [F. 11, 21-23] He was notified to appear before the board on June 28, 1951. [F. 11, 24] He appeared before the board at the time and place appointed. The local board had a stenographic report made of the hearing. [F. 26-27] The local board at the close of the hearing considered all of the evidence and voted unanimously that Franks should continue to be classified in Class I-A. [F. 25] He was notified of this classification and appeal was made by Franks. [F. 11, 28-29]

The local board then ordered Franks to take a preinduction physical examination on October 9, 1951. He was thereafter on October 19th declared to be physically acceptable

to the armed forces for service. [F. 11, 30] The board then forwarded the file to the appeal board. [F. 11]

The appeal board on October 25, 1951, entered in its minutes that Franks was not entitled to be classified as a conscientious objector. This entry in the minutes made mandatory a reference of the case to the Department of Justice for an appropriate inquiry and hearing, as required by Section 6(j) of the act. [F. 11]

The case was referred to the Department of Justice. The Federal Bureau of Investigation conducted its appropriate inquiry and investigation. [46, 47] Following the completion of the investigation the case was referred to the hearing officer, together with the secret FBI investigative report. [41] The hearing officer notified Franks to appear before him on March 6, 1952. [F. 33] Franks appeared on the date and at the place appointed and a hearing was conducted. At the hearing he filed numerous affidavits and certificates, all of which corroborated the sincerity of his claim and the genuineness of his conscientious objections. [F. 35-39]

Following the hearing a report was made by the officer to the Department of Justice. The hearing officer reviewed the background of Franks. He then referred to the secret FBI investigative report which apparently supported the claim made by Franks. He then referred to the hearing and the testimony given by Franks. He referred to the testimony that Franks was a boilermaker in a steel plant engaged in the manufacture of steam pipes. He found from the record before him and the hearing that Franks was sincere and that his conscientious objections were genuine, except for the fact that Franks was willing to do defense work. In answer to a question propounded by the hearing officer, Franks said that he would be willing to work in a naval shipyard. [F. 41-44] Franks testified as to the exact statement that he made, which was that he was willing to work in a naval shipyard as long as such work did not directly pertain to warfare. [38]

The hearing officer then recommended to the Department

of Justice that Franks was not entitled to the classification as a conscientious objector because of his willingness to work in a naval shipyard. [F. 44] The Assistant Attorney General wrote a letter recommending the denial of the conscientious objector claim for the reasons stated by the hearing officer. The report of the hearing officer was adopted by the Assistant Attorney General. [F. 40]

The appeal board, after reviewing the entire file and the report of the hearing officer together with the recommendation of the Assistant Attorney General, on July 3, 1952, classified Franks in Class I-A. This classification rejected the conscientious objector status. It also made him liable for unlimited military training and service. [F. 31] The file was returned to the local board and Franks was notified. [F. 11, 45] Franks was then ordered to report for induction. The order issued on October 16, 1952. He was commanded to report on November 3, 1952. Franks reported on that date. He then refused to be inducted. [F. II-III] It was stipulated at the trial that Franks appeared at the induction station, completed the process and refused to submit to induction. [10]

QUESTIONS PRESENTED AND HOW RAISED

I.

The undisputed evidence showed appellant had conscientious objections to participation in both combatant and noncombatant military service. Franks showed that these objections were based on his sincere belief in the Supreme Being. He showed that his obligations were superior to those owed to the state or which arose from human relations. His beliefs were not the result of political, philosophical or sociological views. They were based solidly on the Word of God. [F. 10, 13-19]

The secret FBI investigative report and the report of the hearing officer establish that Franks was sincere in his conscientious objections to participation in combatant and

noncombatant military service. [F. 41-44] The hearing officer, however, recommended against the conscientious objector claim because appellant was willing to work in a defense plant. [F. 44]

The question here presented, therefore, is whether the denial of the claim for classification of appellant as a conscientious objector was arbitrary, capricious and without basis in fact?

II.

The Department of Justice found that appellant was sincere in his conscientious objections to participation in both combatant and noncombatant military service. The undisputed evidence showed that these objections were based on religious training and belief. The Department of Justice recommended against the conscientious objector classification because appellant was willing to do work in a defense plant. The Department of Justice recommended that appellant not be classified as a conscientious objector because of this. [F. 40, 41-44] The appeal board followed the recommendation of the Department of Justice and placed appellant in Class I-A. [F. 31]

On the trial of this case a complaint was made against the invalid recommendation by the Assistant Attorney General and the report of the hearing officer to the appeal board. [13-19] The motion for judgment of acquittal was denied. [36, 50-51]

The question here presented, therefore, is whether the report of the hearing officer and the recommendation of the Department of Justice to the appeal board were illegal, arbitrary, capricious and contrary to the act and regulations.

SUMMARY OF ARGUMENT

POINT ONE

The appeal board had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 83) provides for the classification of conscientious objectors. It excuses persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form.

To be entitled to the exemption a person must show that his belief in the Supreme Being puts duties upon him higher than those owed to the state. The statute specifically says that religious training and belief does not include political, sociological or philosophical views or a merely personal moral code.

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14) provides for the classification of conscientious objectors in Class I-O. This classification carries with it the obligation to do civilian work contributing to the maintenance of the national health, safety, or interest.

The undisputed evidence showed that the appellant had sincere and deep-seated conscientious objections to participation in war. These objections were to both combatant and noncombatant military service. These were based on his belief in the Supreme Being. His belief charged him with obligations to Almighty God superior to those of the state. The evidence showed that his beliefs were not the result of political, sociological, or philosophical views. The file shows without dispute that the conscientious objections were based upon his religious training and belief as one of Jehovah's Witnesses. The appeal board, notwithstanding the undisputed evidence, held that appellant was not entitled to the conscientious objector status.

The denial of the conscientious objector classification is

arbitrary, capricious and without basis in fact.—*United States* v. *Alvies,* 112 F. Supp. 618; *Annett* v. *United States,* 205 F. 2d 689 (10th Cir. 1953); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky. 1952); *United States* v. *Pekarski,* — F. 2d — (2d Cir. Oct. 23, 1953); *Taffs* v. *United States,* — F. 2d — (8th Cir. Dec. 7, 1953); *Jewell* v. *United States,* — F. 2d — (6th Cir. Dec. 22, 1953).

POINT TWO

The report of the hearing officer of the Department of Justice and the recommendation of the Assistant Attorney General to the appeal board (that appellant be denied his conscientious objector status because of his willingness to work in a naval shipyard) were arbitrary, capricious and based on artificial and irrelevant grounds, contrary to the act and regulations.

The hearing officer and the Assistant Attorney General misinterpreted Section 6(j) of the act. Employment, type of work done or what a registrant claiming conscientious objection is willing to do is not made an element of the act. The conscientious objector status is unqualifiedly extended to all persons who are opposed to participation in combatant and noncombatant military service based on religious training and belief, flowing from obligations to the Supreme Being that are higher than those owed to the state. So long as a person meets the definition he is entitled to the classification. The type of work that he is willing to perform may not be considered in determining his conscientious scruples against participation in the armed forces.

Since the conscientious objector status is allowed to noncombatant soldiers, willing to participate in the armed forces as noncombatant soldiers, then, by force of the same reason, complete or full conscientious objector status is allowed to a person who is willing to work in a defense plant or naval shipyard.

Appellant was entitled to have his case determined ac-

cording to the definitions appearing in the act and regulations. It was incompetent and irrelevant for the Department of Justice to rely on fictitious, irrelevant, and immaterial standards as a basis for forfeiture of the claim as a conscientious objector.—*United States* v. *Everngam,* 102 F. Supp. 128 (W. Va. 1951); *Annett* v. *United States,* 205 F. 2d 689 (10th Cir. 1953); *Taffs* v. *United States,* —F. 2d— (8th Cir. Dec. 7, 1953); *United States* v. *Pekarski,* —F. 2d— (2d Cir. Oct. 23, 1953).

The recommendation of the hearing officer of the Department of Justice and the Assistant Attorney General to the appeal board was based on irrelevant and immaterial standards, thereby violating the act and the regulations.

ARGUMENT

POINT ONE

The appeal board had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 83) provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service

because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participa-

> tion in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. § 456(j), 65 Stat. 83.

The documentary evidence submitted by the appellant establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service which were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry.

There is no question whatever on the veracity of the appellant. The local board and the appeal board accepted his testimony. Neither the local board nor the appeal board raised any question as to his veracity. They merely misinterpreted the evidence. The question is not one of fact but is one of law. The law and the facts irrefutably establish that appellant is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

There is absolutely no evidence whatever in the draft board file that appellant was willing to do military service. All of his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. The appeal board, without any justification whatever, held that he was willing to perform military service. Never, at any time, did the appellant suggest or even imply that he was willing to perform any military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of military machinery.

The decision in *United States* v. *Alvies,* 112 F. Supp. 618, at pages 623-625, is applicable here. For the reasons there discussed the denial of the conscientious objector status here should be held to be without basis in fact.

The only conclusion that appellant can reach as to why the appeal board denied the conscientious objector status is that there was an erroneous interpretation of the law.

In appealing from the I-A classification Franks did not waive his conscientious objector classification. There is nothing in the file to so indicate.

Even when one has a conscientious objector classification given to him by the local board and appeals therefrom for Class IV-D he does not waive his conscientious objector status. It has been specifically held that such does not amount to a waiver.—*Cox* v. *Wedemeyer,* 192 F. 2d 920 (9th Cir.).

The denial of the conscientious objector classification is without basis in fact. (See *United States* v. *Konides,* No. 6216, District of New Hampshire, March 12, 1952, and *United States* v. *Konides,* No. 6264, District of New Hampshire, decided by Woodbury, Circuit Judge, S. D., on June 23, 1953.) Konides appealed to the President twice and received I-A twice. After each classification orders to report for induction were issued. Konides refused to be inducted twice. Each time an indictment issued. Each time the indictment was dismissed because of the arbitrary denial of the conscientious objector status by the President. (See also *Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.); *United States* v. *Loupe,* Cr. No. 249-52, District of New Jersey, July 17, 1953; *United States* v. *Pekarski,* —F. 2d— (2d Cir. Oct. 23, 1953); *Taffs* v. *United States,* —F. 2d— (8th Cir. Dec. 7, 1953); *Jewell* v. *United States,* —F. 2d— (6th Cir. Dec. 22, 1953).) Copies of the *Konides, Loupe, Pekarski, Taffs* and *Jewell* opinions accompany this brief.

The documents filed by appellant showed that when ordered to take up arms and fight in Caesar's army of this world Jehovah's Witnesses raise their conscientious objections to quit worshiping and serving Jehovah and thereby render unto Caesar the things that are God's. They take this stand as ministers with conscientious objections notwithstanding the fact that they are not pacifists.

Their conscientious objection to rendering military serv-

ice to Caesar and in Caesar's army is based solely upon the commands of God's Word, the Bible, because they are his ministers or ambassadors for the new world of righteousness. (2 Corinthians 5:20) These are, therefore, conscientious objections to the performance of military service, that are based on Bible grounds. They are not pacifists. They are ministers conscientiously opposed to the performance of military service. "We know that we are children of God, and that the whole world lies in the power of the evil one." (1 John 5:15, *Weymouth*) They are, therefore, conscientious objectors and ministers, or ministers with conscientious objections.

There is no Scriptural authorization for Jehovah's Witnesses to bear arms in the service of the armed forces of any nation. Based on such training and belief Jehovah's Witnesses have conscientious objections to rendering such service. These objections are conscientiously based upon the law of Almighty God. That law, which is supreme, commands the true Christian minister to maintain an attitude of strict neutrality toward participation in international, national or local conflicts. This strict neutrality required by the supreme law is enforced by the commands of God, which prohibit Jehovah's Witnesses from bearing arms or joining the armed forces of the nations of this world.

The fact that entering "Caesar's" armed forces is usually by conscription or forced service does not make it Scriptural. Regardless of whether the service is voluntary or by capitulation to commands, the situation is the same: the Christian minister of Jehovah thus gets unscripturally involved in the affairs of the nations of this world. He who is a friend of the world is an enemy of God. (James 4:4) A Christian minister does not take a course of action that is at enmity with God. He must follow in the footsteps of the Lord Jesus Christ and keep himself unstained by the world. (1 Peter 2:21; James 1:27, *An American Translation*) This he does by faithfully sticking to his post of duty as a minister and ambassador of Jehovah. He does

not abandon it to participate in the controversies of this world of Satan.

It is true that Jehovah's Witnesses, as Christian ministers of God, reside in all the nations of the world. That fact does not mean that they are mixed up with the political affairs or the international controversies of such nations. They are in the world but not of it. Jesus prayed to his Father, "I have given your word to them, but the world has hated them, because they are no part of the world just as I am no part of the world." (John 17:14, 16, *New World Translation*) Jehovah, through Christ Jesus, has taken them out of the controversies and affairs of this world and drawn them into the exclusive business of preaching the good news of Jehovah's kingdom, and, as ambassadors to the nations of the world, carrying his warning message of the coming battle of Armageddon. "As for us, our citizenship exists in the heavens, from which place also we are eagerly waiting for a savior, the Lord Jesus Christ."—Philippians 3:20, *New World Translation;* John 15:19.

Jehovah's Witnesses must not entangle themselves in the affairs of this world. This is because they are soldiers in the army of Jehovah. "Endure hardness, as a good soldier of Jesus Christ. No man that warreth entangleth himself with the affairs of this life; that he may please him who hath chosen him to be a soldier." (2 Timothy 2:3, 4) As such Christian soldiers they fight to get the message about God's kingdom to every creature.—Mark 16:15.

Jehovah's Witnesses fight lawfully as such soldiers with all of the legal instruments, such as the constitutional rights, the statutory rights and other lawful rights granted to them by the nations of this world. They fight for freedom on the home front of the nation where they reside. They fight to defend and legally establish the good news before courts, ministers, officials, administrative boards and other agencies of governments. (Philippians 1:7, 16)

They fight with weapons that are not carnal. These are the mouth, the faculty of reason, the process of logic and the law of the land. "For though we walk in the flesh, we do not wage warfare according to what we are in the flesh. For the weapons of our warfare are not fleshly, but powerful by God for overturning strongly entrenched things. For we are overturning reasonings and every lofty thing raised up against the knowledge of God, and we are bringing every thought into captivity to make it obedient to the Christ."—2 Corinthians 10:3-5, *New World Translation; Weymouth.*

In addition to the legal instruments that such Christian soldiers use, the great weapon that they wield among the nations of the earth is the "sword of the spirit, which is the word of God." (Ephesians 6:17) As soldiers of Jehovah and Christ they put on only the uniform that is prescribed by the law of God for Christian soldiers, his witnesses, to wear. That uniform is the armor of God. They have on the helmet of salvation and the breastplate of righteousness. They bear the shield of faith and wield the sword of the spirit, valiantly defending the righteous principles of Almighty God as commanded by the apostle Paul: "Put on the complete suit of armor from God that you may be able to stand firm against the machinations of the Devil, because we have a fight, not against blood and flesh, but against the governments, against the authorities, against the world-rulers of this darkness, against the wicked spirit forces in the heavenly places. On this account take up the complete suit of armor from God, that you may be able to resist in the wicked day and, after you have done all things thoroughly, to stand firm."—Ephesians 6:10-13, *New World Translation.*

Since they are in the Lord's army of gospel-preachers, they certainly have conscientious objections to serving in the armies of the evil world of Satan. As soldiers of God they cannot engage in the conflicts and warfare that flow from the affairs of this world. They cannot be in two armies

at the same time. Since they have been enlisted and serve in Jehovah's army as his ministers, they must be at their missionary posts of duty. They cannot leave such posts in order to take up service in some other army. To quit Jehovah's army and join the armies of Satan's world would make the soldiers of God deserters. Deserters are covenantbreakers. "Covenantbreakers . . . are worthy of death." (Romans 1:31, 32) The nations of this world cannot excuse Jehovah's soldier from the penalty of death prescribed by Almighty God for deserters from his army. Caesar, not being able to relieve him from his covenant obligations or violations thereof, should not command him to become a renegade and deserter from Jehovah's army to join his. That would result in his everlasting death. "And do not become fearful of those who kill the body but cannot kill the soul, but rather be in fear of him that can destroy both soul and body in Gehenna. Do not be afraid of the things you are destined to suffer. Look! the Devil will keep on throwing some of you into prison that you may be fully put to the test, and that you may have tribulation ten days. Prove yourselves faithful even with the danger of death, and I will give you the crown of life."—Matthew 10:28; Revelation 2:10, *New World Translation.*

In the Hebrew Scriptures there are many cases where Jehovah's Witnesses fought and used violence and carnal weapons of warfare. They fought in the armies of the nation of Israel. At the time they fought as members of the armed forces of Israel it was God's chosen nation. They did not, however, enlist or volunteer in the armies of the foreign nations round about. They fought only in the armed forces of Israel, the nation of God. They did not join the armies of the Devil's nations. They maintained strict neutrality as to the warring nations who were their neighbors. When Jehovah abandoned and destroyed his chosen nation, he abandoned completely and forever the requirement that his people fight with armed forces. Since then there has been no force used by his witnesses in any armed force.

There is no record in the Bible that any of the faithful Israelites enlisted in the armed forces of or fought in behalf of any of the Devil's countries or nations. To the contrary we have the instance of Abraham who maintained his neutrality. (Genesis 14) Also to the same effect is Zerubbabel, a soldier of Jehovah, who had a covenant to rebuild the temple. He refused to participate in the military conflicts that the world power, Medo-Persia, got into. He remained strictly neutral. For so doing he was accused of sedition and was prosecuted. Jehovah, however, blessed him for his neutral stand and for keeping to his post of duty under his covenant obligations.—Ezra 5:1-17; 6:1-22.

This position of strict neutrality, requiring refusal to participate in international conflicts between the forces of the nations of Satan's world, is also based on the Bible ground that Jehovah's Witnesses are ambassadors who serve notice of the advance of the great warrior, Christ, who is leading a vast army of invisible warriors of the armed force of Jehovah. (2 Corinthians 5:20; Revelation 19:14) He is advancing against Satan's organization, all of which, human and demon, he will destroy at the battle of Armageddon.

Jehovah's Witnesses do not participate in the modern-day armed forces of Jehovah. (2 Chronicles 20:15-17) Participation in that armed force is limited to the powerful angelic host, led by the invisible Commander, Christ Jesus. He rides at the front on his great white war mount. (Revelation 19:11-14) The weapons of the invisible forces of Jehovah are unseen but destructive weapons. Such will make the weapons of Caesar's armed forces of this world like children's toys in comparison. (Joel 3:9-15; Isaiah 40:15) Jehovah's weapons of destruction at Armageddon will be used by only his invisible forces, and not by Jehovah's Witnesses.

The weapons of warfare wielded by Jehovah's Witnesses are confined to instruments that cannot be used in violent warfare. They use the "sword of the spirit, which is the

word of God" as his Christian soldiers and ambassadors to warn the nations of this world of the coming battle of Armageddon. That will result in the defeat of all of Satan's armies and the wiping off the face of the earth of all the nations and governments of this evil world. "For it is my decision to gather nations, to assemble kingdoms, that I may pour out my wrath upon them, all the heat of my anger, for in the fire of my zeal all the earth shall be consumed." (Zephaniah 3:8, *An American Translation;* Jeremiah 25:31-33; Nahum 1:9, 10) They therefore cannot give up the weapons of their warfare and take up the weapons of violence in behalf of the nations of the world of Satan. The use of such weapons by Jehovah's Witnesses and their participation in any way in the international armed conflicts would be in defiance of the unchangeable law of Almighty God.

There is no record that the Lord Jesus or his apostles or disciples entered the armies of Caesar. The record of secular history shows that the early Christians at Rome refused to fight in Caesar's army. They were thrown to the lions and persecuted because of following the command of Christ Jesus to disassociate themselves from the affairs of the evil world.

The basis of objections to military service by followers of Christ Jesus, including the early Christians at Rome and their modern-day counterparts, Jehovah's Witnesses, can best be summed up by Jesus, who declared, "My kingdom is no part of this world. If my kingdom were part of this world, my attendants would have fought that I should not be delivered up to the Jews. But, as it is, my kingdom is not from this source." (John 18:36, *New World Translation*) Since Jehovah's Witnesses are not of this world, then, as the Lord Jesus did not, they cannot fight in or join up with the armed forces of the nations of this world represented by Caesar. They, accordingly, render to God that which is God's by remaining steadfastly in his army of witnesses and refusing to volunteer or submit to the

armed forces of Caesar in international conflicts. They render to Caesar all obligations of citizenship that do not require them to violate God's law. Thus they do as Jesus said: "Pay back Caesar's things to Caesar, but God's things to God."—Mark 12:17, *New World Translation.*

Jehovah's Witnesses do not advocate that the governments of this world do not have the right to raise armies from those other than the ministers of God. They do not teach others of Jehovah's Witnesses or people who are not to refuse to support the armed forces or volunteer for service. It would be wrong to do so. They render to Caesar the things that are Caesar's by not teaching the subjects of Caesar to refuse to fight. Jehovah's Witnesses do not aid, abet or encourage persons who are not ministers with conscientious objections to resist the commands of Caesar. They do not, in fact, tell each other what to do or not to do. Each witness of Jehovah decides by himself alone what course he will take. His decision as to whether to render to God what is God's is dictated by his individual understanding of the law of God in the Word of Jehovah, the Bible. His decision is formed not by the written or printed word of the Watchtower Society or any person among Jehovah's Witnesses.

The draft act provides for the deferment of conscientious objectors, as well as the exemption of ministers of religion. Jehovah's Witnesses are entitled to claim the exemption granted to the ministers of God and the orthodox clergy. They are also entitled to the deferment extended to the conscientious objectors who refuse to participate in warfare based on religious training and belief notwithstanding the fact that they are not pacifists. In complying with such law by claiming such ministerial exemption and deferment they render to Caesar the things that belong to Caesar. They are therefore consistent in making their claim. They are conscientious objectors but not pacifists. In taking this stand they continue and remain God's ministers, properly called the witnesses of Jehovah.

Jehovah's Witnesses do not consider the act unconstitutional. They believe that it is within the province of a nation to arm itself and resist attack or invasion. It is admitted that the Government has the authority to take all reasonable, necessary and constitutional measures to gear the nation for war and so lubricate the war machinery to keep it working effectively.

Conscription of man power for the purpose of waging war is of ancient origin. Before the Roman Empire and early world powers, the nation of Israel registered men for military training and service. Complete exemption from military service and training was provided, however, for ministers and priests known as "Levites." Twenty-three thousand of the first registration were completely exempt according to statistics. Under this system of raising and maintaining an army the Jewish nation fought many battles and gained many victories. Since the destruction of the Jewish nation, Jehovah's Witnesses have been neither commanded nor authorized to conscript man power or wage wars. They are not organized as a nation in the world as were the Israelites. They are in the world as ambassadors to represent God's kingdom, as witnesses to proclaim the theocracy, the only hope of the people of good will to obtain peace, prosperity, happiness and life. They neither oppose nor advocate opposition to or participation by others in war. Each one individually, for himself, determines what course he must take according to the perfect Word of God. As one of the "royal priesthood," Jehovah's Witnesses, as the Levites, lay claim to complete exemption from military service according to the provision of the act because they are ordained ministers of the gospel of God's kingdom. This position of strict neutrality is the position taken by everyone who fights not with carnal weapons and faithfully and strictly follows in the footsteps of Christ Jesus and preaches the gospel as did he and his apostles, according to the Holy Word of God.

History shows that the early Christians claimed exemp-

tion from military service required by the Roman Empire, because they were set apart from the world as a royal priesthood to preach God's kingdom. Hence they were neutral toward war. They claimed complete exemption from training and service, which was disallowed by the Roman Empire. Because they refused military service they were cruelly persecuted, sawn asunder, burned at the stake and thrown to the lions.—See Henry C. Sheldon, *History of the Christian Church,* 1894, Crowell & Co., New York, p. 179 *et seq.;* E. R. Appleton, *An Outline of Religion,* 1934, J. J. Little & Ives Co., New York, p. 356 *et seq.;* Capes, *Roman History,* 1888, Scribner's Sons, New York, p. 113 *et seq.;* Willis Mason West, *The Ancient World,* 1913, Allyn & Bacon, Boston, pp. 522-523, 528 *et seq.;* Capes, *The Roman Empire of the Second Century,* Scribner's Sons, New York, p. 135 *et seq.;* Ferrero & Barbagallo, *A Short History of Rome* (translated from Italian by George Chrystal), Putnam's Sons, New York, 1919, p. 380 *et seq.*

A realistic approach to the construction of an act providing for benefits to religious organizations requires that boards make "no distinction between one religion and another.... Neither does the court, in this respect, make any distinction between one sect and another." (Sir John Romilly in *Thornton* v. *Howe,* 31 Beavin 14) The theory of treating all religious organizations on the same basis before the law is well stated in *Watson* v. *Jones,* 80 U. S. (13 Wall.) 679, 728, thus: "The full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." It must be assumed that Congress, when it provided for ministers of religion to be exempt from all training and service, intended to adopt the generous policy above expressed so as to extend to all ministers of all religious organizations.

It has been judicially declared that were "the administration of the great variety of religious charities with which our country so happily abounds, to depend upon the opinion of the judges, who from time to time succeed each other in the administration of justice, upon the question whether the doctrines intended to be upheld and inculcated by such charities, were consonant to the doctrines of the Bible; we should be entirely at sea, without helm or compass, in this land of unlimited religious toleration." (*Knistern* v. *Lutheran Churches,* 1 Sandf. Ch. 439, 507 (N. Y.)) All religions, however orthodox or heterodox, Christian or pagan, Protestant or Catholic, stand equal before the law which regards "the pagan and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Buddhist, the Catholic and the Quakers as all possessing equal rights." (*Donahoe* v. *Richards,* 38 Me. 379, 409. Cf. *People* v. *Board of Education,* 245 Ill. 334, 349; *Grimes* v. *Harmon,* 35 Ind. 198, 211) Protection is therefore afforded not only "to the different denominations of the Christian religion, but is due to every religious body, organization or society whose members are accustomed to come together for the purpose of worshiping the Supreme Being." (*Freeman* v. *Scheve,* 65 Neb. 853, 879, 93 N. W. 169) It is now clear that the American legislative, executive and judicial policy concerning religious organizations, beliefs and practices is one of masterly inactivity, of hands off, of fair play and no favors. (*People* v. *Steele,* 2 Bar. 397) "So far as religion is concerned the laissez faire theory of government has been given the widest possible scope."—*Freeman* v. *Scheve,* 65 Neb. 853, 878, 93 N. W. 169.

Neither Shakers nor Universalists will be discriminated against in distributing the avails of the land granted by Congress in 1778 for "religious purposes." (*State* v. *Trustees of Township,* 2 Ohio 108; *State* v. *Trustees,* Wright 506 (Ohio)) Whatever the personal views of a judge may be concerning the principles and ceremonies of the Shaker society, whether to his mind their practices smack of fanaticism or not, he has no right to act upon such individual

opinion in administering justice. (*People* v. *Pillow,* 3 N. Y. Super. Ct. (1 Sandf.) 672, 678; *Lawrence* v. *Fletcher,* 49 Mass. 153; *Cass* v. *Wilhite,* 32 Ky. (2 Dana) 170) In the field of religious charities and uses the doctrine of superstitious uses was eliminated from American jurisprudence as opposed to the spirit of democratic institutions because it gave preference to certain religions and discriminated against others. It was held that the doctrine is contrary to "the spirit of religious toleration which has always prevailed in this country" and could never gain a foothold here so long as the courts were forbidden to decide that any particular religion is the true religion. (*Harrison* v. *Brophy,* 59 Kans. 1, 5, 51 P. 885; cf. *Methodist Church* v. *Remington,* 1 Watts 219, 225, 26 Am. Dec. 61 (Pa.); *Andrew* v. *New York Bible and Prayer Book Society,* 6 N. Y. Super. Ct. (4 Sandf.) 156, 181) Thus in the field of various religions as long as a particular method of preaching does not conflict with the law or the rights of others no matter how exotic or curious it may be in the opinion of others it is fully protected by the law. —*Waite* v. *Merrill,* 4 Me. (4 Greenl.) 102, 16 Am. Dec. 238, 245.

Congress did not intend to confer upon the draft boards or the district judge arbitrary and capricious powers in the exercise of their discretion. They have discretion to follow the law when the facts are undisputed. If there is a dispute, the boards have the jurisdiction to weigh the testimony. In the case of a denial of the conscientious objector status, if there is no dispute in the evidence and the documentary evidence otherwise establishes that the registrant is a conscientious objector, it is the duty of the court to hold that there is no basis in fact. It must conclude that there is an abuse of discretion, and that the classification is arbitrary and capricious. It is submitted that such is the case here. The undisputed evidence shows that the appellant is a conscientious objector entitled to the I-O classification. The denial of the classification is without basis in fact.

The classification of I-A flies in the teeth of the evidence. Such classification is a dishonest one, making it unlawful. —*Johnson* v. *United States,* 126 F. 2d 242, at page 247 (8th Cir.); *Dickinson* v. *United States,* 346 U. S. — (Nov. 30, 1953).

A district court opinion bears directly upon the question involved here. This is the unreported oral opinion rendered by Judge Clifford from the bench, sitting in the United States District Court for the District of New Hampshire in cause No. 6216, *United States* v. *Konides,* March 12, 1952. In that case one of Jehovah's Witnesses was denied the conscientious objector status. The facts, as far as the evidence appearing in the file on the subject of conscientious objection is concerned, were identical to the facts in this case. A printed copy of the stipulation of fact and oral opinion rendered by Judge Clifford is here referred to and accompanies this brief.—Compare *Phillips* v. *Downer,* 135 F. 2d 521, 525-526 (2d Cir.); *United States* v. *Grieme,* 128 F. 2d 811 (3rd Cir.).

A case closely in point here is *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky. Dec. 19, 1952), where the defendant was a member of the National Guard at the time of his registration and the filing of his original questionnaire. The board had deferred him because of his membership in that military organization. Following this he became one of Jehovah's Witnesses. He later filed claims for classification as a minister of religion and as a conscientious objector. The case was appealed to the National Selective Service Appeal Board, which classified him in Class I-A. The classification was set aside as arbitrary and capricious. Read at page 378.

The pivotal decision for the determination of issues raised in draft prosecutions is *Estep* v. *United States,* 327 U. S. 114. The Supreme Court there itemized certain things committed by a draft board "that would be lawless and beyond its jurisdiction." (327 U. S., at page 121) Read what

the Court said about provisions of the act that make determinations of draft boards "final," at pages 121-123.

In note 14 of the *Estep* opinion (at page 123) the Court says that the scope of judicial inquiry to be applied in draft cases is the same as that of deportation cases, and the Court cited *Chin Low* v. *United States,* 208 U. S. 8; *Ng Fung Ho* v. *White,* 259 U. S. 276; *Mahler* v. *Eby,* 264 U. S. 32; *Vajtauer* v. *Commissioner,* 273 U. S. 103; *Bridges* v. *Wixon,* 326 U. S. 135. In this note the Court added that "is also the scope of judicial inquiry when a registrant after induction seeks release from the military by *habeas corpus.*" The Court concluded note 14 explaining the scope of judicial review by citing the opinion of the Second Circuit in *United States* v. *Cain,* 144 F. 2d 944.—327 U. S., at page 123.

In the *Estep* case, the Court said that, in reviewing draft board files, judges are not to weigh the evidence to determine whether the classification was justified. A court weighs the evidence only when there is some contradiction in the evidence. There must be some dispute before this burden falls upon the court to determine whether the classification is justified. The Court added, however, that if there is no basis in fact for a classification after a review of the file by a court, it would be the duty of the court to hold that the classification was beyond its jurisdiction. —327 U. S., at page 122.

There is no basis in fact for the classification in this case because there are no facts that contradict the documentary proof submitted by the appellant. The facts established in his case show that he is a conscientious objector to both combatant and noncombatant service and, therefore, the classification given is beyond the jurisdiction of the boards.

The undisputed evidence shows that appellant is sincere in his objections. He is opposed to any form of participation in war by himself. This objection comes from an immovable belief in the Supreme Being. It is not based on

sociological, political or philosophical beliefs. It is supported by the direct Word of God, the Bible. It is not a limited objection that he has. He is not willing to join the army as a noncombatant soldier or go in as a conscientious objector only to actual combat service. He objects to doing anything in the armed forces. He will not be a soldier.

It was well known to the Congress, the nation, the Government and the courts of the United States that Jehovah's Witnesses are conscientiously opposed to noncombatant military service. They were not unaware that these objections of Jehovah's Witnesses are based on a belief in the supremacy of God's law above obligations arising from any human relationship. These facts bring Jehovah's Witnesses within the plain words of the act. Twisting the words of the law and discoloring the act subvert the intent of Congress not to discriminate.

The strict construction of the act advocated by the Government and the court below was not intended by Congress; Congress had in mind a liberal interpretation of its provision for conscientious objectors to protect the religious objector. The records of the hearings in Congress, the reports and the act all prove a broad exemption was intended. Congress had in mind that objection to war is a part of the religious history of this country. Conscientious objection was recognized by Massachusetts in 1661, by Rhode Island in 1673 and by Pennsylvania in 1757. It became part of the laws of the colonies and states throughout American history. It finally became part of the national fabric during the Civil War and has grown in breadth and meaning ever since. (See Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. I, pp. 29-66, Washington, Government Printing Office, 1950.) So strongly was the principle of conscientious objection imbedded in American principles that President Lincoln and his Secretary of War thought that conscientious objectors had to be recognized. This is impressed upon us by Special Monograph No. 11, Vol. I, *supra,* at page 43: "At the end of hostilities

Secretary of War Stanton said that President Lincoln and he had 'felt that unless we recognize conscientious religious scruples, we could not expect the blessing of Heaven.' "

As appears above, the Selective Service System in Special Monograph No. 11, Vol. I, carries the history far back, even before the American Revolution. (*Ibid.,* pages 29-35) Virginia and Maryland exempted the Quakers from service. (*Ibid.,* page 37) From the Revolution to the Civil War provision for exemption of conscientious objectors appears in the state constitutions. During the Civil War the military provost marshal was authorized to grant special benefits to noncombatants under Section 17 of the act, approved February 24, 1864. Lincoln was urged to force conscientious objectors into the army. He replied:

> "No, I will not do that. These people do not believe in war. People who do not believe in war make poor soldiers. . . . These people are largely a rural people, sturdy and honest. They are excellent farmers. The country needs good farmers fully as much as it needs good soldiers. We will leave them on their farms where they are at home and where they will make their contributions better than they would with a gun."—*Ibid.,* pages 42-43.

Congress certainly must have had in mind the historic national policy of fair treatment to conscientious objectors. The well-known governmental sympathy toward the Quakers and others was not ignored by Congress when the act was passed. Congress must have had in mind the historic considerations enumerated by the Supreme Court in *Girouard* v. *United States,* 328 U. S. 61. Read 328 U. S. at pp. 68-69.

In passing the provisions for conscientious objection to war in all the draft laws Congress had this long history in mind. It intended to preserve the freedom of religion and

conscience in regard to conscientious objection, and it provided a law whereby such freedom could be preserved.

It is respectfully submitted that the motion for judgment of acquittal should have been sustained because there is no basis in fact for the classification given by the draft boards and the denial of the total conscientious objector classification was arbitrary and capricious. The judgment of the court below should be reversed, therefore, and the trial court directed to enter a judgment of acquittal.

POINT TWO

The report of the hearing officer of the Department of Justice and the recommendation of the Assistant Attorney General to the appeal board (that appellant be denied his conscientious objector status because of his willingness to work in a naval shipyard) were arbitrary, capricious and based on artificial and irrelevant grounds, contrary to the act and regulations.

Section 6(j) of the act provides for the appropriate inquiry and hearing in the Department of Justice. The act and the regulations provide for the recommendation by the Department of Justice to the appeal board following the hearing before the hearing officer. The act and the regulations, therefore, make the inquiry, the hearing and the recommendation of the Department of Justice to the appeal board a statutory and vital link in the chain of administrative proceedings. The consequence of this is that it is necessary that the proceedings in the Department of Justice be in accordance with law and that they do not conflict with and defy the law.

Appellant submits that the Department of Justice misinterpreted Section 6(j) of the act. It is to be observed that Congress never provided that the conscientious objections must be to "war in any form." Congress did not hold that a conscientious objector who was not opposed to self-defense and employment in defense work was not a

conscientious objector. It is participation in war in any form that is the subject matter of the statutory provision for the conscientious objector. Nothing whatever is said in the act or the regulations or in the legislative history that indicates anything to the effect that if a person is willing to do a certain type of work he cannot be considered a conscientious objector having conscientious scruples to participation in war in any form even though he was willing to perform secular defense work as a means of employment. If the unreasonable interpretation placed upon the act by the trial court and the local board is accepted it will authorize an unending and uncontrollable scope of inquiry. Every type of work and act that may be conceivably thought of can be relied upon to determine and deny the conscientious objector status.

Congress did not intend to allow an inquest to be held as to the kind of work that a registrant did or was willing to do. Congress intended to protect every person who had conscientious objections based upon religious grounds to participation in war in any form. Congress did not make the factors relied upon by the trial court and the local board in this case as any basis in fact for the denial of the conscientious objector claim.

Neither the act nor the regulations make the type of work that a person does a criterion to follow in the determination of his conscientious objections. The sole questions for determination of conscientious objection are: (1) does the person object to participation in the armed forces as a soldier? (2) does he believe in the Supreme Being? (3) does this belief carry with it obligations to God higher than those owed to the state? (4) does his belief originate from a belief in the Supreme Being and not from a political, sociological, philosophical or personal moral code?

Franks' case commands affirmative answers to all these questions. He fits the statutory definition of a conscientious objector.

It is entirely irrelevant and immaterial to hold that

there was basis in fact because Franks was willing to work in a steel plant. This was not an element to consider and in any event it was no basis in fact according to the law for the denial of his claim. It did not impeach or dispute in any way what he said in his questionnaire and conscientious objector form, all of which was corroborated by the FBI report. The law does not authorize the draft boards to invent fictitious and foreign standards and use them to speculate against evidence and facts that are undisputed.—*Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Alvies,* 112 F. Supp. 618 (N. D. Cal. S. D. 1953); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky. 1952); *United States* v. *Everngam,* 102 F. Supp. 128 (D. W. Va. 1951).

The question of employment and work performed by one who claims to be a conscientious objector becomes material only when the type of work done or agreed to be done by the conscientious objector is of a combatant nature. The Congress of the United States in passing the Universal Military Training and Service Act provides for two kinds of conscientious objectors. One is a person who has objections only to the performance of combatant service. He is recognized as willing to wear a uniform and do anything in the armed forces except kill or bear weapons. This type of conscientious objector does not have his conscience questioned because of the type of work he is willing to perform even though it may be in the armed forces. No board or official of the government may deny a registrant his conscientious objector claim to the I-A-O classification (limited military service as a conscientious objector opposed to combatant military service only) because of his willingness to perform noncombatant service in the armed forces, thus helping the armed services do a job of killing.

It is submitted also that the conscientious objector to both combatant and noncombatant military service ought not to be denied his conscientious objector classification because of the kind of work he is doing outside the armed

services. The law disqualifies no one on such ground. It seems that a reasonable interpretation of the act and the regulations would not make the type of employment that a registrant is willing to do relevant so long as it does not involve combatant or noncombatant military service.

It is apparent that the conclusion reached by the hearing officer, after finding as a fact appellant to be a conscientious objector, was arbitrary and capricious because the basis for the rejection of appellant's evidence was on illegal and irrelevant grounds.—*Linan* v. *United States,* 202 F. 2d 693 (9th Cir. 1953).

The report of the hearing officer was adopted by the Department of Justice and forwarded to the appeal board with a recommendation that it be followed. The appeal board followed the recommendation. While the recommendation was only advisory, the fact is that it was accepted and acted upon then by the appeal board. The appeal board concurred in the conclusions reached by the hearing officer. It gave appellant a I-A classification and denied his conscientious objector status. This action on the part of the appeal board prevents the advisory recommendation of the Department of Justice from being harmless error. —See *United States* v. *Everngam,* 102 F. Supp. 128 (D. C. W. Va. Oct. 31, 1951).

A chain is no stronger than its weakest link. The recommendation of the Department of Justice and its acceptance by the appeal board becomes a link in the chain. Since it is one of the links of the chain, its strength must be tested. (*United States* v. *Romano,* 103 F. Supp. 597 (D. C. N. Y. S. D. 1952)) The absence of the FBI report from the record and the withholding of it from the registrant at the hearing produces a break in the link and makes the entire Selective Service chain useless, void and of no force and effect. The Supreme Court held in *Kessler* v. *Strecker,* 307 U. S. 22, that if one of the elements is lacking, the "proceeding is void and must be set aside." (307 U. S., at page 34) The acceptance of the recommendation of the Department of

Justice which has been made up without producing the FBI report to the registrant in the proper time and manner makes the proceedings illegal notwithstanding the fact that the recommendation is only advisory. The embracing of the report and recommendation by the appeal board jaundiced and killed the validity of the proceedings.

This view of the reliance upon the recommendation of the Department of Justice making the report of the hearing officer and the recommendation a vital link in the administrative chain is supported by *United States* v. *Everngam,* 102 F. Supp. 128 (D. C. W. Va. 1951), at pages 130, 131. —See also *United States* v. *Bouziden,* 108 F. Supp. 395. (W. D. Okla.); compare *Taffs* v. *United States,* — F. 2d — (8th Cir. Dec. 7, 1953).

The holding below giving freedom to the hearing officer to find against appellant on grounds outside the law conflicts with *Reel* v. *Badt,* 141 F. 2d 845 (2d Cir.). In that case the court said: "In other words, he reached a conclusion as a matter of law which was directly opposed to our decision in *U. S.* v. *Kauten,* 133 F. 2d 703." (141 F. 2d, at page 847)—See also *Phillips* v. *Downer,* 135 F. 2d 521 (2d Cir.), at pages 525-526.

It is respectfully submitted that the recommendation by the hearing officer and the Department of Justice to the appeal board is illegal, arbitrary and capricious, and jaundiced and destroyed the appeal board classification upon which the order to report was based.

CONCLUSION

It is submitted that the undisputed evidence showed that appellant was conscientiously opposed to participation in both combatant and noncombatant military service. The denial of the full conscientious objector status was, therefore, without basis in fact. The final I-A classification by the appeal board, accordingly, was arbitrary and capricious. The recommendation of the Department of Justice

(that appellant was not entitled to claim classification as a conscientious objector, notwithstanding his sincerity, because he was willing to work in a naval shipyard as a civilian employee) was immaterial, irrelevant and contrary to the act and the regulations. The acceptance of the recommendation and the giving of the I-A classification by the appeal board, based on such recommendation of the Department of Justice, are void. The classification, as well as the order to report for induction, is illegal.

The judgment of the court below ought, therefore, to be reversed. The trial court should be instructed to enter a judgment of acquittal.

Respectfully submitted,

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